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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 515

ROBERT S. BERSON AND OSCAR BENNES, ET AL.,
Petitioners,

vs.

GRAVERAET Y. KAUFMAN, THE FIRST NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER THE WILL OF OTTO YOUNG, DECEASED, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Respondents oppose the petition for certiorari on three grounds. *First*, the decision of the court below does not conflict with any decision of any other court of appeals or of this Court. *Second*, the questions of law involved are peculiar to the facts of this case and are not of general importance. *Third*, the decision below is correct and is supportable on numerous alternative grounds.

THE QUESTIONS PRESENTED FOR REVIEW.

Petitioners, claimants under purported assignments and subassignments of dollar portions of a testamentary trust estate, seek review of the jurisdiction of the District Court to adjudicate the validity of their claims and reexamination of the trust accounting decree of May 22, 1958. The Court of Appeals upheld the District Court's jurisdiction and the May 22 decree.

The possible alternative grounds upon which the lower court's decision can be sustained are so numerous that no single issue is likely to be dispositive. Because of the complexity of this case, the following are the basic questions which would arise on review.

1. Was the Court of Appeals correct, on the facts of this case, in reaffirming its previous holding that in addition to its original diversity jurisdiction the District Court long ago acquired jurisdiction *in rem* or *quasi in rem* because of its complete control of the administration, liquidation, and distribution of the trust estate?

2. If the District Court has jurisdiction over the trust *res*, does it have jurisdiction to determine the validity of claims against portions of that *res*?

3. May petitioners obtain review of the District Court's jurisdiction to adjudicate their claims by challenging a decree which neither exercises that jurisdiction nor adjudicates their claims?

4. If there were no personal jurisdiction over petitioners, would they not be bound by the accounting decree of May 22, 1958, either because of the District Court's jurisdiction to enter an accounting decree or because they are privies of parties who are bound?

5. Was the Court of Appeals correct in holding that petitioners had failed to show that the May 22 decree affected their claims against the trust estate in any way?

6. Was the Court of Appeals correct on the facts of this case in affirming the District Court's decision that the accounting decree of May 22, 1958, was a judicial determination and not a consent decree?

7. Was the Court of Appeals correct on the facts of this case in holding that petitioners had abandoned any rights they might have had in connection with the trust accounting by failing to protect such rights when they could and should have done so?

8. Was the Court of Appeals correct on the facts of this case in holding that all the shares of the testamentary trust, including those of which petitioners claim portions, should bear a pro rata part of the fees incurred in this litigation and the trust's administration?

STATEMENT OF THE CASE.

Otto Young died testate November 30, 1906, leaving his estate in trust. The Testamentary Trustee was The First National Bank of Chicago and its corporate predecessor. The corpus of the trust estate became distributable upon the death of Otto Young's last surviving daughter, Mrs. Marie Julia Pratt, on August 17, 1956. The present petition for certiorari grows out of one aspect of the litigation in which the trust estate has been involved for the past sixteen years.

Petitioners' Relation to This Litigation.

Petitioners are 56 out of some 500 persons who claim ownership interests measured in dollar amounts in one or more of four of the eighteen shares in the Otto Young trust estate.* During the life of the trust, and while the

* Since the filing of their petition for certiorari, however, 42 petitioners have settled their claims against the trust estate and therefore have no interest in the petition

litigation of which the present petition is a part was pending, petitioners and others acquired purported dollar interests from four grandchildren of Otto Young by instruments in the form of assignments and subassignments. These instruments were served upon the Trustee. When the trust estate became distributable in 1956 the four grandchildren claimed their shares free of ownership interests of others and demanded that the Trustee distribute to them. Petitioners were brought into the case along with all others claiming portions of the trust estate so that the District Court could adjudicate the validity of the conflicting claims and order proper distribution.

Petitioners resisted being brought into the case and took the opportunity afforded by an order entered February 20, 1958, calling for the payment to a grandchild of funds claimed by petitioners, to carry their jurisdictional attack to the Court of Appeals. Though they took no part in the Trustee's accounting which went forward with their knowledge while they were in the case, petitioners took a second appeal, from the decree entered May 22, 1958, which approved the Trustee's final statement of accounts as accurate and complete, approved a settlement of objections to the Trustee's management of the estate, and assessed fees both for the accounting proceedings and for the administration and distribution of the trust estate. The Court of Appeals decided the two appeals in one opinion. On the first appeal the Court reversed the order of February 20, 1958, for the payment of funds, but affirmed the District Court's jurisdiction to determine the validity of petition-

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and no standing to conduct further proceedings. These petitioners are: Marion G. Beuerle, Frederick C. Beuerle, Jr., Edmund W. Bokat, Frederick Conn, Sophye B. Davis, Phyllis C. Hoffman, Norman Jay, Rose Jay, Manfred Lewandowski, Nelly Lewandowski, Mildred Mitchell and Belle Zavod.

In addition, Henry Legum, who is named as a petitioner was not an appellant below.

ers' claims against the trust estate. On the second appeal the Court held petitioners bound by the accounting decree of May 22, 1958. Petitioners now seek review by this Court of the May 22 decree and also seek to use that decree as the occasion for further review of the District Court's jurisdiction to try their claims. The order of February 20, 1958, having been reversed, is no longer available for that purpose.

The District Court's Jurisdiction Through Control of the Trust Estate.

This litigation was begun in 1943, by Joseph de Korwin (whose heir, Margaret de Korwin, is a respondent here), during the life of the trust. The complaint sought, among other things, a construction of the will of Otto Young, an accounting by the Trustee, the removal of the Trustee and the appointment of a receiver, the division and distribution of the trust estate, and general relief. Jurisdiction, based upon diversity of citizenship, was sustained by the Court of Appeals (156 F. 2d 858), and this Court denied certiorari (329 U. S. 795). The District Court construed the will, held that each grandchild of Otto Young had a remainder interest vested subject to defeasance, held that plaintiff had a vested remainder, declared the trusteeship vacant, appointed receivers, and ordered an accounting. *DeKorwin* v. *The First National Bank of Chicago*, 84 F. Supp. 918 (N. D. Ill., 1949). The determination of the remainder interests in the trust estate was thus made in 1949 and not as petitioners state, by the decree of December 14, 1951. The Court of Appeals affirmed in all respects other than the vacancy of the trusteeship and appointment of receivers, and directed the District Court to proceed in conformity with the views expressed. *DeKorwin* v. *The First National Bank of Chicago*, 179 F. 2d 347 (C. A. 7th, 1949), cert. denied, 339 U. S. 982 (1950).

Issues involving allocation of funds between principal and income, distribution of income, and other matters were raised in the District Court. Other issues involving the supervision, liquidation, and distribution of the trust estate came before the Court, and, on December 14, 1951, the Court entered a decree creating a Conveyance and Liquidation Trust to liquidate the large holdings of real estate and leaseholds in the trust estate in order to make distribution practicable at termination. By that decree the Court also deferred the taking of the Trustee's accounts until the termination of the trust. Pursuant to the Court's orders, the Liquidation Trustees took conveyances of trust properties, and, upon termination of the trust, managed and liquidated them. Because of the issues and problems then before the District Court, the decree of December 14, 1951, provided for exercise by the Court of other broad powers of control and supervision of the trust estate. Apart from the provisions of that decree, however, the District Court was called upon to and did grant other relief calling for control over the trust *res*, as in the supervision and approval of sales of trust property. A statement of many of these facts is contained in *DeKorwin* v. *The First National Bank of Chicago*, 136 F. Supp. 720 (N. D. Ill., 1955). The Court of Appeals' opinion dismissing the appeal from that decision, 235 F. 2d 156 (C. A. 7th, 1956), approved the District Court's conclusion that it had even then acquired such dominion and control over the trust estate as to have jurisdiction *in rem* or *quasi in rem*.

Subsequently, when the time for final distribution of the trust assets had arrived, the District Court was informed of the conflicting claims by petitioners and others to ownership of four of the eighteen shares of the trust estate. The Court ordered that separate accounts be created for the contested shares and that these segregated shares be held and administered by the Trustee subject to the further

orders of the Court. All payments into and out of these segregated shares have been and are made only upon order of the District Court.

On April 12, 1957, the Court issued a bar order under Section 1655 of the Judicial Code requiring petitioners, as well as all other claimants, to appear and plead. Petitioners and other claimants are residents of various states throughout the country. Petitioners appeared on June 17, 1957, to challenge the District Court's jurisdiction to adjudicate their claims. The attack on jurisdiction being denied, petitioners pleaded, claiming ownership of specified dollar amounts of the four segregated shares.

The Accounting Proceedings and the Decree of May 22, 1958.

Pursuant to the District Court's orders the deferred accounting went forward and the Trustee submitted its final accounts covering the period March 26, 1916, to August 17, 1956. Objections to the Trustee's management of the trust estate were filed by persons representing seven of the eighteen shares of the trust estate, including the four shares under which petitioners claim. The objections ranged over a period of forty years and presented a wide variety of questions of trust administration. Questions of surcharging the Trustee and of marshalling trust assets were raised.

The District Court referred the accounting to a Master for hearing and report on June 14, 1957. Petitioners, as noted, above, entered the case on June 17, 1957. The first hearing before the Master was held on July 17, 1957. Extensive discovery went forward, involving study of the Trustee's books and records of account, comprising approximately 26,000 pages, examination of over 60 file drawers of original data and documents, study of 38 audit reports by independent firms of certified public account-

ants, and interviews with numerous persons. Factual investigations and preparation of legal issues continued until March 10, 1958, when formal hearings for the taking of evidence began. These hearings lasted, with adjournments, from March 10, 1958, to April 24, 1958. The Trustee put on witnesses and introduced documentary evidence to prove the completeness and accuracy of its accounts as submitted.

On April 21, 1958, just before the Trustee completed its case on its accounting records, the adult beneficiaries approved a settlement of the objections to the Trustee's management of the trust estate. This settlement provided for the payment of $100,000 into each of the seven shares represented by objectors. Each of the four shares under which petitioners claim received such a payment. The settlement was made subject to approval by the Master and the District Court. It was submitted to and fully discussed with both. The Master found that the Trustee's accounts were complete and accurate; he also found that the settlement of disputes over the Trustee's forty-year management of the trust's business affairs was fair and proper.

The Master filed his report with the Clerk of the District Court on May 7, 1958, and the Clerk on that day mailed notice of the filing to all parties, including petitioners. On May 14, 1958, the Trustee served notice on all parties, including petitioners, that it would move the Court to adopt the Master's report. At the hearing on May 22, 1958, the District Court adopted the Master's report and entered the decree recommended. The Court denied petitioners' attempt to file objections to the report at the May 22 hearing on the ground they came too late. A few days later petitioners moved to modify the decree on the ground that they had not consented to it. The District Court denied the motion on June 5, 1958, holding that the decree was a judicial determination and did not require petitioners' consent. From this order and the decree of May 22, 1958, petitioners appealed.

Petitioners' Non-participation in the Accounting.

Petitioners entered the case on June 17, 1957, three days after the accounting had been referred to the Master. The docket and the record then showed the Trustee's submission of accounts, the objections, and the reference. Petitioners had actual knowledge of the status of the accounting proceedings at least by August 19, 1957, when the Trustee served a brief containing that information upon them. The Trustee served a similar brief on petitioners again on September 20, 1957. The taking of testimony by the Master did not begin for almost seven months after service of the first brief, the hearings were concluded eight months after such service, and the Master's report was filed almost nine months afterward. In all that time petitioners neither filed any objections to the Trustee's accounts or management nor sought to do so. They never examined the Trustee's records which, as they were informed, were open to all parties. They did not attend a single hearing before the Master. They filed no objections to the Master's report as required by FRCP 53(e)(2). With full knowledge, they ignored all proceedings until May 22, 1958, and then they sought to object to the Master's report on the sole ground that it assessed fees against shares they claimed under. Their motion to modify also sought only that relief. Petitioners never objected to the accounting aspects of the decree of May 22, 1958, until they were in the Court of Appeals for the Seventh Circuit.

The Decision Below.

On the foregoing facts, the Court of Appeals for the Seventh Circuit held both that petitioners were properly brought into the proceedings in the District Court to have their claims to part of the trust *res* determined and that petitioners were bound by the decree of May 22, 1958. The Court of Appeals held petitioners bound for three distinct

reasons. *First*, petitioners' only argument that the decree should not bind them was that they did not consent to it, but the Court of Appeals held the decree a judicial determination not requiring petitioners' consent. *Second*, petitioners had not shown that the segregated shares were inadequate to cover their dollar amount claims even after the assessment of fees. Without that showing, the fees assessed would not prevent petitioners' claims, if held valid, from being paid in full, and obviously a second accounting action could not benefit petitioners in any way. *Third*, petitioners had abandoned any rights they might have had to challenge the accounting by consistently refusing every opportunity provided to protect such rights.

Respondents.

The petition omits mention of most of the actual respondents in this case and lists instead numerous persons who are not respondents.

Petitioners' adversaries below and the actual respondents here are the Trustee, the Liquidation Trustees, and all beneficiaries under the will of Otto Young, namely the grandchildren and issue and heirs of deceased grandchildren. These persons, only some of whom petitioners have seen fit to name as respondents, oppose the petition for certiorari and subscribe to this brief.

Petitioners have also included as respondents all the assignees and subassignees claiming under one of the four segregated shares. These persons were appellants with petitioners in one of the appeals below. They do not seek certiorari. It is not known why the petition names them respondents.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH ANY DECISION OF ANY OTHER COURT OF APPEALS OR OF THIS COURT.

The Court of Appeals held that under the facts of this case the District Court has exercised such complete control and dominion over the trust estate, and particularly over the four segregated shares, that it has acquired jurisdiction *in rem* or *quasi in rem*.

Both this Court and various courts of appeals have repeatedly held that a trial court acquires jurisdiction *in rem* or *quasi-in rem* when a suit, originally based on diversity jurisdiction, is brought to marshall assets, to restore amounts expended in improper trust investments, administer trusts, liquidate estates, or for similar relief, where, to give effect to its jurisdiction the Court must control the property. *United States* v. *Bank of New York*, 296 U.S. 463-6(1936); *Princess Lida* v. *Thompson*, 305 U.S. 456 (1939); *Dahlgren* v. *Pierce*, 263 Fed. 841 (C.A. 6th, 1920), appeal dismissed, 256 U.S. 682 (1921), cert. denied, 256 U.S. 692 (1921). Such issues and claims for relief were repeatedly brought before the District Court in this case and, as the Court of Appeals held, the District Court expressly "took over the supervision and direction of the administration, liquidation and distribution of the trust estate." (Pet. App. p. 5.)

The holding in *Mandeville* v. *Canterbury*, 318 U.S. 47 (1943), relied upon by petitioners, does not conflict in any way with *Princess Lida*, *Bank of New York*, or this case.

In *Mandeville* this Court reversed the injunction of an Illinois district court restraining suits in Minnesota and Wisconsin relating to land in those states, on the ground that the jurisdiction of the Illinois district court was *in personam* "so far as it relates to the subject matter of the suits pending in Minnesota and Wisconsin." (318 U.S. at 49.) This was recognition that a court of one jurisdiction cannot affect title to real estate in another jurisdiction except through *in personam* power over the owners. The *Mandeville* opinion, however, also recognized that a district court would acquire jurisdiction *in rem* or *quasi in rem*, and hence exclusive control, over a trust *res* where the district court had decided that plaintiff had an interest in the *res*, had necessarily undertaken to exercise supervisory and administrative control of the *res*, and where the *res*, so far as it included real estate, was within the court's territorial jurisdiction. In *Mandeville*, none of these factors were present and this Court held that the district court's jurisdiction as to the foreign real estate was *in personam*. In the present case, all of these factors are present and the Court of Appeals therefore held, consistently with *Mandeville*, that the District Court has jurisdiction *in rem* or *quasi in rem*.

It is well established by decisions of this Court that a court with jurisdiction *in rem* or *quasi in rem* has ancillary jurisdiction to determine all claims to the ownership of the *res*. *Farmer's Loan and Trust Co.* v. *Lake Street Elevated Railroad Co.*, 177 U.S. 51, 61 (1900); *Central Union Trust Co.* v. *Anderson County*, 268 U.S. 93, 96 (1925); *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 128 F. 2d 481, 485 (C.A. 7th, 1942); *Dahlgren* v. *Pierce*, 263 Fed. 841, 844-45 (C.A. 6th, 1920), appeal dismissed, 256 U.S. 682 (1921), cert. denied, 256 U.S. 692 (1921). These cases refute petitioners' attempt to confine the entire concept of ancillary jurisdiction to suits brought to enforce prior judgments of the same courts.

Contrary to petitioners' contention, a stakeholder may employ Section 1655 of the Judicial Code to get service upon claimants to a *res* in its hands. *Dahlgren* v. *Pierce*, 263 Fed. 841 (C.A. 6th, 1920), appeal dismissed, 256 U.S. 682 (1921), cert. denied, 256 U.S. 692 (1921); *A/S Kredit Pank* v. *Chase Manhattan Bank*, 155 F. Supp. 30 (S.D.N.Y., 1957); *Brown* v. *Pegram*, 143 Fed. 701 (C.C.E.D. Pa., 1906). Moreover, in this case the assigning grandchildren demanded that they be permitted to employ Section 1655 to bring in the adverse claimants if the Trustee was not ordered to do so. Any objection to the Trustee's use of Section 1655 is therefore not only without foundation in law but is addressed to a technicality which could prejudice no one.

Petitioners' contention that venue is improper ignores the fact that section 1655 is also a venue statute which provides for venue over all claimants to a *res* in the district where the *res* is located. *Greeley* v. *Lowe*, 155 U.S. 58 (1894); *Huntress* v. *Huntress' Estate*, 235 F. 2d 205 (C.A. 7th, 1956); *Graff* v. *Nieberg*, 233 F. 2d 860 (C.A. 7th, 1956).

The decision of the Court of Appeals in this case, therefore, conflicts with no decision of this Court or of any court of appeals, and violates no federal law. Instead the decision below is in full accord with principles repeatedly enunciated by this Court and numerous lower courts.

II.

THE QUESTIONS OF LAW HERE INVOLVED ARE PECULIAR TO THE FACTS OF THIS CASE AND ARE OF NO GENERAL IMPORTANCE.

The complete lack of general significance of this case is illustrated by the threshold issue which would be presented on any review: have petitioners' claims been

impaired in any way by the May 22 decree? A determination of this issue depends entirely upon the particular facts of this case, including: (a) the value of each segregated share; (b) the total amount of claims of assignees and subassignees, including petitioners', against each share; and (c) the priorities as among the various claimants, including petitioners, to each share. The record petitioners have brought to this Court, and which they brought to the Court of Appeals below, does not show the size of any contested share nor the total claims against any share. Moreover, the priority of claims has not been established. Thus, the May 22 decree cannot be shown to have affected petitioners' claims in any way.*

Another preliminary question on review would be whether petitioners, having objected in the District Court to nothing more than the allowance of any fees from the shares they claim under, are able to expand their objections to other aspects of the May 22, 1958, decree at the appellate level.

The other questions presented in the case are of no greater general importance. Petitioners seek to attach due process significance to the fact that the Court of Appeals disagreed with their position. The questions actually involved, however, are far more mundane: *e. g.*, whether, on the facts of this case and the record before the Master and the District Court, the decree of May 22, 1958, was a consent decree or embodied a judicial determination; and whether petitioners' repeated deliberate refusals to take any part in the accounting proceedings before the Master

* The District Court has not yet determined the validity of petitioners' claims to the trust estate. This fact, together with those noted in the text, indicates not only that petitioners have failed to demonstrate prejudice but that the whole proceeding below stands at an intermediate stage and is not ripe for consideration by this Court.

and in the District Court disable them from seeking a second accounting proceeding at this juncture.

The only jurisdictional question in this case is whether the facts show that the issues brought before the District Court and its control and supervision of the trust estate through various orders and decrees are sufficient to bring the case within the rules laid down in numerous decisions. See pp. 11 to 13, *supra*.

III.

THE DECISION OF THE COURT OF APPEALS IS SUPPORTABLE ON SEVERAL ALTERNATIVE VALID GROUNDS.

The Court of Appeals' decision is based on and is supportable on alternative grounds. There is no single question which is dispositive of the issues. For example, since petitioners cannot demonstrate that the May 22 decree will have the effect of preventing any of their claims, if ultimately held valid, from being paid in full, petitioners can point to nothing which adversely affects them. Petitioners thus have no appealable interest which would enable them to question either the District Court's jurisdiction or the merits of the May 22 decree.

Alternatively, review of the accounting decree of May 22, 1958, would not support review of the District Court's jurisdiction to determine petitioners' claims to the trust *res*. The May 22 decree in no way adjudicates petitioners' claims, but merely ends the accounting phase of this litigation. Thus, the only jurisdictional review the decree could support would be a review of the District Court's jurisdiction to take the Trustee's accounts. Petitioners do not and have not challenged that jurisdiction.

Aside from questions of jurisdiction, moreover, the Court of Appeals affirmed the May 22 decree on three alternate grounds set forth in the opinion (Pet. App. p. 8):

Basically the assignees fail in three respects when they argue that inasmuch as they did not consent to the decree it is not binding on them. Their first error is that this is not a consent decree. In the second place the record fails to disclose, nor have they in argument before this Court shown, in what manner they are injured. Thirdly, they the assignees, have failed in every way to protect their alleged rights at a time when they could and should have done so.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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